# CERCLA Requirements Associated with Real Property Transfers

*Background:* In the light of recent important changes to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), this Information Brief has been prepared to update Information Brief EH-231-022/1193 (November 1993), *RCRA and CERCLA Requirements Associated with the Sale or Transfer of DOE Property.* On September 23, 1996, President Clinton signed the Fiscal Year 1997 Defense Authorization Act (PL 104-106). Section 334 of this act, "Authority to Transfer Contaminated Federal Property Before Completion of Required Response Actions," changes Section 120(h)(3) of CERCLA. The change allows for deferral of the requirement that a covenant statement be included in the deed warranting that all remedial action necessary has been taken prior to the transfer of real property. This change effectively allows more expeditious transfers of certain Federal real property where CERCLA response actions have yet to be completed. This Information Brief covers all of the CERCLA statutory and regulatory requirements pertinent to transfer of real DOE property.

*Statute:* CERCLA Section 120(h)

*Regulation*: 40 CFR Part 373 "Reporting Hazardous Substance Activity When Selling or Transferring Federal Real Property."

*Reference*: 1. "Cross-Cut Guidance on Environmental Requirements for DOE Real Property Transfers," U.S. Department of Energy, Office of Environmental Guidance, RCRA/CERCLA Division, October 1997 DOE/EH-413/9712 (Oct. 97)

## What is meant by the term "real property transfer?"

Real property includes land and improvements (such as roads, buildings, and other structures, including installed permanent fixtures) on the land. The term transfer includes transactions in which the ownership of the real property changes (e.g., sale or interagency transfer), and transactions in which the ownership does not change (e.g., lease or easement). Differing CERCLA requirements apply to each type of transfer.

## What procedures must be followed when real property is transferred?

For Federal agencies, the procedures required when real property is transferred differ depending on how the property came under the agency's control. The mechanics of real property transfer involve a complex array of regulations promulgated by the Bureau of Land Management (BLM) and the General Services Administration (GSA), and by DOE Orders 4300.1C and 430.1, all of which are fully addressed in the EH-413 guidance document, "Cross-Cut Guidance on Environmental Requirements for DOE Real Property Transfers," [DOE/EH-413/9712 (Oct. 97)]. Generally, the GSA regulations follow CERCLA Section 120(h)(1) and (3) requirements and are codified at 41 CFR 101-47.202-2(b)(10). The use of GSA form SF 118, "Report of Excess Real Property," and attachments, is specified by DOE for reporting the information required under CERCLA when the transfer involves a change in ownership. The BLM regulations at 43 CFR 2372.1 require reporting of the extent to which decontamination has taken or will take place, though no specific standard form for supplying this information is required. None of these regulations require the collection of additional or different information regarding hazardous substances or petroleum and its derivatives other than that specified under CERCLA.

**Table 1**
**Comparison of the CERCLA § 120(h)(1),(3), (4) and (5) Requirements**

| Requirement | CERCLA § 120(h)(1) | CERCLA § 120(h)(3) | CERCLA § 120(h)(4) | CERCLA § 120(h)(5) |
|---|---|---|---|---|
| **Brief Description** | **Include in the contract for sale or transfer, a notice of the types and quantities of hazardous substances stored ≥ 1 year, disposed of, or released on the property and the time at which these activities took place.** | **Report on the deed the types and quantities of hazardous substances stored for ≥ 1 year, disposed of, or released on the property and the time at which these activities took place.** | **Identify uncontaminated parcels of land (i.e., land on which no contaminants were stored ≥ 1 year, disposed of, or released).** | **Notify States of sites that are being closed and that are encumbered by a lease beyond the closure date and are contaminated (i.e., land on which contaminants were stored ≥ 1 year, disposed of, or released).** |
| **Contaminants Covered** | **Hazardous substances as found at 40 CFR 302.4 only.** | **Hazardous substances as found at 40 CFR 302.4 only.** | **Hazardous substances or any petroleum product or its derivatives.** | **Hazardous substances or any petroleum product or its derivatives.** |
| **Threshold Quantities** | **As specified by 40 CFR Part 373: the greater of 1,000 kg or the RQ for storage of ≥ 1 year; the RQ for release or disposal; and 1 kg for acutely hazardous waste.** | **As specified by 40 CFR Part 373: the greater of 1,000 kg or the RQ for storage of ≥ 1 year; the RQ for release or disposal; and 1 kg for acutely hazardous waste.** | **Not specified; the same thresholds specified by § 120(h)(1) & (3) are suggested.** | **Not specified; the same thresholds specified by § 120(h)(1) & (3) are suggested.** |
| **Information Source** | **Departmental files only; however, it is a best management practice to follow the most stringent data gathering requirements [found at § 120(h)(4)].** | **Departmental files only; however, it is a best management practice to follow the most stringent data gathering requirements [found at § 120(h)(4)].** | **Reasonably obtainable Federal, State, and local government records and other sources (interviews, physical inspection, sampling, and aerial photographs).** | **Not specified; however, it is a best management practice to follow the most stringent data gathering requirements § 120(h)(4)].** |
| **Types of Real Property Transfers Covered** | **All real property transfers regardless of whether ownership changes, including transfers between Federal agencies.** | **All real property transfers in which ownership changes, and transfers between Federal agencies.** | **Not specified.** | **Leases of real property after operations cease.** |

### To what properties do CERCLA requirements associated with real property transfers apply?

CERCLA requirements apply to all DOE property transfers (see Table 1 for a summary of the requirements). Specifically, CERCLA requirements apply to:

- Properties where hazardous substances have been stored, disposed of, or released.
- Property that is not contaminated and at which Federal operations are being terminated.
- Property that is to be closed and that is encumbered by a lease beyond the closure date where any hazardous substance or petroleum product or its derivatives (including aviation fuel and motor oil) have been stored, disposed of, or released.

## What level of diligence is required in investigating if a DOE property has been contaminated?

As shown in Table 1, the information sources to be consulted during an investigation vary by CERCLA Section. It is suggested that if DOE files show no evidence of the storage, disposal, or release of hazardous substances, that the most stringent data gathering requirement [imposed by CERCLA Section(h)(4)] be applied to fulfill the requirements of CERCLA Sections 120(h)(1), (3), and (5).

## What are the CERCLA reporting requirements associated with real property transfer?

There are information reporting requirements applicable to the contract associated with the transfer, and additional requirements applicable to the deed of the property being transferred. In addition, there are CERCLA requirements applicable only to properties that are to be leased and to properties that are uncontaminated.

**Contract (sale or lease) Requirements:**

(1) **Where storage, release, or disposal of hazardous substances has occurred.**

Report in the contract of sale or lease the name of the hazardous substance; the Chemical Abstracts Services Registry Number (CASRN) where applicable; the regulatory synonym for the hazardous substance as listed in 40 CFR 302.4, where applicable; the quantity in kilograms and pounds of the hazardous substance that has been stored for one year or more, or known to have been released, or disposed of on the property; and the dates that such storage, release or disposal took place. While this is the extent of the statutory requirement (and the EPA regulations at 40 CFR 373.3), 41 CFR 101- 47.202-2 requires that GSA SF 118 and attachments be utilized whenever a property is sold. There are thirteen requirements associated with SF 118 attachments, among them the requirement that the above information be reported along with a discussion of whether all remedial action necessary to protect human health and the environment with respect to hazardous substances has been taken, and if such action has been taken, when such action will be completed. The SF 118 is not required when property is leased.

In addition, when a property is to be sold, GSA requires that the disposal agency (DOE or GSA, as the case may be) insert the above into the Invitation for Bids/Offers to Purchase as well as the following statements [41 CFR-47.304-14]:

*The information contained in this notice is required under the authority of regulations promulgated under section 120(h) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or "Superfund") 42 U.S.C. section 9620(h).*

*The holding agency (i.e. DOE) advises that* [provide information on the type and quantity of hazardous substances; the time at which storage, release, or disposal took place; and a description of the remedial action taken.]

*All remedial action necessary to protect human health and the environment with respect to the hazardous substance activity during the time the property was owned by the United States has been taken. Any additional action found to be necessary shall be conducted by the United States.*

If the purchaser is a potentially responsible party (PRP) with respect to hazardous substances, the above statement must be modified to represent the liability of the potentially responsible party for any remedial action.

(2) **Where no storage, release, or disposal of hazardous substances has occurred**.

There are no CERCLA requirements covering the contract associated with the transfer. However, GSA requires that the following statement be attached to the SF 118.

*DOE has determined, in accordance with the regulation issued by the Environmental Protection Agency at 40 CFR Part 373, that there is no evidence to indicate that hazardous substance activity took place on the property during the time the property was owned by the United States.*

(3) **Additional requirements for property that is to be leased from DOE.**

In addition to the requirements of Section 120(h)(1) and (3) there are reporting requirements regarding property on which the DOE plans to terminate operations and that is to be leased. [Note: Section 120(h)(3)(B) specifically states that the covenants required at Section 120(h)(3)(A)(ii) do not apply in any case in which the transfer of property occurs or has occurred by means of a lease.] If any hazardous substance or any

petroleum product or its derivatives, including aviation fuel and motor oil, was stored for one year or more, or known to have been disposed of or released, DOE must notify the State in which the property is located of any lease that will encumber the property beyond the date of termination of DOE operations on the property. The notification must be made before entering into the lease and must include the length of the lease, the name of the person to whom the property is leased, and a description of the uses that will be allowed under the lease of the property, buildings, and other structures on the property. [CERCLA Section 120(h)(5)]

**Deed Requirements:**

(1) **Where storage, release, or disposal of hazardous substances has occurred.**

Enter into the deed notice the following: name of the hazardous substance; the Chemical Abstracts Services Registry Number (CASRN) where applicable; the regulatory synonym for the hazardous substance as listed in 40 CFR 302.4, where applicable; the quantity in kilograms and pounds of the hazardous substance that has been stored for one year or more, or known to have been released or disposed of on the property; and the dates that such storage, release, or disposal took place. The above requirements are the same as those in the contract.

In addition, a description of the remedial actions taken, if any, is to be placed in the deed. [Note: this description is not required by 40 CFR 373, but by CERCLA Section 120(h)(3)(A)(i)(III).]

A covenant must be attached to the deed if the property is not being transferred to a PRP. The covenant must warrant the following:

(A) All remedial action necessary to protect human health and the environment from hazardous substances remaining on the property has been taken before the date of the property transfer. All remedial action has been considered taken if the construction and installation of an approved remedial design has been completed, and the remedy has been demonstrated to EPA (or the State) to be operating properly and successfully does not preclude the property transfer. [CERCLA Section 120(h)(3)(B)]

(B) Any additional remedial action found to be necessary after the date of property transfer shall be conducted by the United States.

Under certain circumstances, this covenant may be deferred [CERCLA 120(h)(3)(C)] as discussed below.

This covenant does not apply in any case in which the person or entity to whom the real property is transferred is a PRP with respect to this property. [CERCLA Section 120(h)(3)(B)]

This covenant is not required in any case in which the transfer of the property occurs or has occurred by means of a lease, without regard to whether the lessee has agreed to purchase the property or whether the duration of the lease is longer than 55 years. [CERCLA Section 120(h)(3)(B)]

(2) **Where no storage, release, or disposal has occurred.**

If it is determined that the property to be transferred is uncontaminated, the following is to be placed in the deed:

(A) A covenant warranting that any response action or corrective action found to be necessary after the date of sale or transfer shall be conducted by the United States. [CERCLA Section 120(h)(4)(D)(i)]

(B) A clause granting the United States access to the property in any case in which a response action or corrective action is found to be necessary after such dates such property or such access is necessary to carry out response action or corrective action on adjoining property. [CERCLA Section 120(h)(4)(D)(ii)]

### Under what circumstances may the covenant in the deed of a property where storage or contamination has occurred, as mentioned above, be deferred?

Because the covenant specified above [CERCLA Section 120(h)(3)(A)(ii)(I)] warrants that all remedial action has been taken before the date of property transfer, the transfer of any property where remedial actions have not

been completed was precluded. This was not the intention of Congress, so on September 23, 1996, President Clinton signed the Fiscal Year 1997 Defense Authorization Act. In this act, Section 334, "Authority to Transfer Contaminated Federal Property Before Completion of Required Response Actions," changes Section 120(h)(3) of CERCLA. The change allows for deferral of the required covenant statement [Section 120(h)(3)(A)(ii)(I)] warranting that all remedial action necessary has been taken. The deferral is allowed provided certain conditions are met. They are:

(1) The appropriate official [if the property is on the National Priority List (NPL), the EPA administrator with the State governor's concurrence; if not on the NPL, the State governor] determines that the real property is suitable for transfer and makes the deferral [Section 120(h)(3)(C)(i)];

(2) Response action assurances are provided in the deed or other agreement proposed to govern the transfer [Section 120(h)(3)(C)(ii)]; and

(3) At the conclusion of response actions, DOE executes and delivers a warranty that response actions have been taken. The warranty is considered to satisfy the requirement for the covenant statement specified in Section 120(h)(3)(A)(ii)(I). [Section 120(h)(3)(C)(iii)]

### How does the appropriate official determine whether the property is suitable for transfer?

The appropriate official makes the determination of suitability for transfer on the basis of the following criteria:

(1) The property is suitable for the use intended by the transferee, and the intended use is consistent with the protection of human health and the environment. [Section 120(h)(3)(C)(i)(I)]

(2) DOE publishes in a newspaper of general circulation in the vicinity of the property, a notice of the following [Section 120(h)(3)(C)(i)(III)]:

(A) The proposed transfer, and

(B) An opportunity for the public to submit, within a period of not less than 30 days after the notice, written comments on the suitability of the property for transfer.

(3) The deferral and real property transfer will not substantially delay any necessary response action at the real property. [Section 120(h)(3)(C)(i)(IV)]

(4) The deed or other agreement governing the real property transfer contains the following clauses [Section 120(h)(3)(C)(i)(II)]:

(A) Necessary restrictions on the use of the property to ensure the protection of human health and the environment (e.g., the maintenance of an institutional barrier).

(B) Restrictions on the use necessary to ensure that the required remedial investigations, response actions, and oversight activities will not be disrupted.

(C) Assurance that response action will be taken and identification of the schedules for investigation and completion of all necessary response actions as approved by the appropriate regulatory agency.

(D) Assurance that a DOE budget request to the Office of Management and Budget that adequately addresses schedules for investigation and completion of all necessary response actions for the property, subject to Congressional authorizations and appropriations, will be submitted.

### What does DOE do when all the response actions are completed?

When all response actions necessary to protect human health and the environment are completed, DOE shall execute and deliver to the transferee the above-required covenant statement warranting the completion of all remedial actions. [Section 120(h)(3)(C)(iii)]

Questions of policy or questions requiring policy decisions will not be dealt with in EH-413 Information Briefs unless that policy has already been established through appropriate documentation. Please refer any questions concerning the material covered in this Information Brief to Beverly Whitehead, EH-413, by phone at (202-586-6073) or by e-mail at beverly.whitehead@eh.doe.gov.